RECENT CASES.

ADMIRALTY — JURISDICTION OF STATE COURT — ENFORCING LIEN GIVEN BY STATE. — Pub. St., Mass., c. 192, § 14, gives a lien for repairs furnished a vessel in her home port. Section 17 of same chapter gives the State courts authority to enforce such liens; *held*, that the State courts have jurisdiction to enforce such liens by proceedings *in rem*, notwithstanding Rev. Stat. U. S. § 563, subd. 8, and § 711, subd. 3 (giving the United States District Courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitor the right of a common law remedy in all cases where the common law is competent to give it") Morton and Knowlton, JJ., *dissent*. *Atlantic Works* v. *The Glide*, 33 N. E. Rep. 163 (Mass.).

Holmes, J., who gives the opinion of the majority of the court, has previously discussed this question in his note in 3 Kent's Commentaries, 12th ed., 171. He takes the position that the lien is a right of property by itself, distinct from a right to proceedings *in rem*, just as a mortgage is distinct from the foreclosure proceedings given to enforce it. It has been held by the United States courts that a State law creating a lien where there is no parallel lien given by maritime law is valid; and if the State may give the lien, it would be strange if it could not enforce it. If the lien is regarded merely as a remedy on a maritime contract, then the State by its statute would simply be trying to establish a remedy in certain admiralty cases; and as the State has no courts of admiralty, that would really be attempting to impose a new process on a court outside of its power. Morton, J., who gives a dissenting opinion, contends that the lien is merely a remedy for enforcing a maritime contract, and not a distinct right of property, and thus is within the exclusive jurisdiction of the District Courts under the clause above stated. The United States courts enforce such liens on the same principle on which they have enforced liens given by foreign law.

AGENCY — MASTER AND SERVANT — WHAT CONSTITUTES THE RELATIONSHIP. — The defendants, manufacturers of fireworks, contracted with a Fourth of July Committee of the town of A to furnish a $400 display of fireworks, and to send down a man to take charge of it. The female plaintiff, a spectator at the celebration, was injured by the horizontal discharge of a rocket by a boy of seventeen whom the defendants had sent down with the man contracted for; the boy at the time of the accident being under the control of one of the committee. The plaintiff was nonsuited at the trial. *Held*, affirming the nonsuit, that the contract was for the sale and delivery of personal property, not one requiring the defendants to give a display or exhibition; that the boy who discharged the rocket which struck the plaintiff was not at the time the servant of the defendants, but of the committee. *Wyllie et ux.* v. *Palmer*, 33 N. E. Rep. 381 (N. Y.).

AGENCY — RAILWAY COMPANY AND CONDUCTOR — AUTHORITY TO ACT IN EMERGENCY. — Action against a railway company to recover for lodging and care furnished a brakeman, injured while making up a train, and carried in an unconscious condition to the plaintiff's house. Soon after, on learning of the accident, the conductor of the train, who was the highest officer of the company present, came to the house, and requested the plaintiff to care for the injured man, and told him that the company would repay him. *Held*, that in such an emergency the conductor had authority to bind the company, whose duty it was to provide the sufferer with shelter and medical attendance. Ross, J., *dissents*. *Toledo St. L. & K. C. R. Co.* v. *Mylott*, 33 N. E. Rep. 135 (Ind. App. Ct.).

This case goes rather farther than most of the cases which precede it, in allowing an inferior official to bind the company in an emergency. *Quære*, would the brakeman or fireman be held to have this implied power? For a collection of authorities on this point, see Am. and Eng. Encyc. of Law, vol. i. p. 365, note, under the heading "Agency."

AGENCY — UNDISCLOSED PRINCIPAL — AGENT ACTING IN CONTRAVENTION TO HIS SECRET INSTRUCTIONS. — H, proprietor of a beer-house, sold out his business to the defendants, a firm of brewers, who retained H in charge of the business, leaving his name on the sign, and taking out the license in his name. In the terms of the agreement it was expressly stipulated that H should obtain cigars for the house from the defendants. Notwithstanding this, H purchased cigars from the plaintiff, who knew nothing of the transfer of the business, and gave credit to H alone. On discovering that H was not the real owner of the business, plaintiff brought action against the defendants for the value of the goods furnished. *Held*, that the defendants, being the real principals, were liable for all acts of their agent within the authority usually confided to

an agent of that character, notwithstanding secret limitations as between principal and agent. *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346 (Eng.).

If the case can be supported it must be on the broad ground that one who intrusts the management of his business to another, remaining himself in the background, should be held responsible for the acts of his manager done in the conduct of the business. The court rely on *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97, which, however, does not go quite the full length of the present case, and seem to have overlooked the case of *Miles* v. *McIlwraith*, 8 App. Cas. 120, where the court decided that an undisclosed principal was not liable on a contract of his general agents who acted in excess of their authority, because there was no evidence to show that the third party knew of the existence of the agency. For a criticism of the principal case, see 37 Solicitor's Journal, 280.

BILLS AND NOTES — LIABILITY OF MAKER — ALTERATION BY FILLING VACANT SPACES. — Defendant made a note, the material part of which was as follows: "I promise to pay to the order of Camp & Ames one hundred dollars at — Value received." After its execution by defendant, this note was altered by inserting the words "or bearer" in a vacant space which defendant had left after the word "Ames," and the words "Bank of Summit, Miss.," after the word "at." There was nothing on the face of the note, as altered, to raise suspicion; and plaintiffs were *bona-fide* purchasers for value. *Held*, that plaintiffs could not recover on this note. *Simmons* v. *Atkinson & Lampton Co.*, 12 So. Rep. 263 (Miss.).

This is a case of first impression in Mississippi. The authorities on this point are sharply divided. The most satisfactory ground on which to explain the decisions opposed to the principal case is that the maker was negligent in leaving such spaces, and "cannot complain of his own default against a person who was misled by that default, without any fault of his own." Cleasby, B., in *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183, at 192. In view of the stress which the courts have always laid on the desirability of making negotiable paper circulate as freely as possible, it seems eminently proper to hold the maker liable in a case of this sort; and although there is room for difference of opinion as to what sort of space it is negligent to leave vacant, we submit that the Mississippi court and the courts which it follows go too far when they hold that "it cannot be negligence to do that which can injure no one unless some one else shall commit a felony." *Holmes* v. *Trumper*, 22 Mich. 427, and *Greenfield Bank* v. *Stowell*, 123 Mass. 196, are in accord with the principal case; *Young* v. *Grote*, 4 Bing. 253; *Yocum* v. *Smith*, 63 Ill. 321, are *contra*.

BILLS AND NOTES — TIME OF MATURITY OF A DEMAND NOTE — INTEREST. — A promissory note was given payable on demand, after date, with interest after maturity. *Held*, that interest ran from demand. Durand and Grant, JJ., *dissented*, and maintained that a demand note was due at once, and interest ran from date of the note. They contended that it was illogical to say that a note matured at one time for the Statute of Limitations, and at another time for purposes of drawing interest. *Nye* v. *King's Estate*, 54 N. W. Rep. 178 (Mich.).

The case seems in accordance with the weight of authority. Tiedeman on Commercial Paper, § 310, p. 540, and cases there cited. It is usually held in this country that the Statute of Limitations runs from date of the note, *De Lavallette* v. *Wendt*, 75 N. Y. 579; and for purposes of negotiation a demand note becomes overdue after a reasonable time from issue. *Ranger* v. *Cary*, 1 Met. 369; *Poorman* v. *Mills*, 39 Cal. 345.

CONFLICT OF LAWS — FOREIGN ASSIGNMENT OF PROPERTY WITHIN THE STATE. — The insolvency laws of Idaho forbid preferences, but those of Utah do not. L, in Utah, made an assignment to plaintiff, with preferences, of personal property situated in Idaho. *Held* (reversing the decision of the Territorial Court of Idaho; see 23 Pac. Rep. 922), that Idaho was bound by interstate comity to recognize the assignment as valid, as against the claim of a citizen of Minnesota who attempted to set up the Idaho statute. *Barnett* v. *Kinney*, 13 Sup. Ct. Rep. 403.

This case is in accord with the language of some recent decisions, but goes farther than the actual point decided in most of them. The assignment here would be universally held bad as against a citizen of Idaho; the rule of comity never prevents a State from protecting its own citizens. It would be held good as against a citizen of Utah; a State usually recognizes the insolvency laws of a sister State as against the citizens of the latter. See Wharton on Conflict of Laws, § 371. As to the present case, when the creditor setting up the Idaho statute is a citizen neither of Idaho nor Utah, there is little actual authority. The decision is sensible.

CONSTITUTIONAL LAW — MUNICIPAL IMPROVEMENTS — TAXATION — ASSESSMENT OF BETTERMENTS. — City of Norfolk took under condemnation proceedings for a street

improvement a strip of defendant's land, and paid $1,200 as compensation both for the land taken and for the damage beyond the benefits received to the residue. Then the city assessed the abutting land for the betterments. *Held*, that under the State Constitution, art. 10, § 1, declaring that "taxation, whether imposed by the State, county, or corporate bodies, shall be equal and uniform," and that "no one species of property shall be taxed higher than any other species of equal value," the assessment was invalid. *City of Norfolk* v. *Chamberlain*, 16 S. E. Rep. 730.

In an elaborate discussion, the court, on grounds of logic and justice, strongly disapprove of *People* v. *Mayor &c. of Brooklyn*, 4 N. Y. 419, the leading case allowing, in absence of constitutional restraint, local assessments for public improvements. That case puts the whole burden on the abutters as the beneficiaries, while at the same time it acknowledges there is a public benefit. The main case is rested on the explicit provisions of the Constitution. Several States with similar provisions allow local assessment on the ground that the Constitution only applies to a general tax. *Emery* v. *San Francisco Gas Co.*, 28 Cal. 345; Dillon, Munic. Corp. §§ 752–761.

The case might have been decided on its special facts. The city ordinance was not complied with (pp. 774–8), and the tax was not assessed on any system of proportion among the abutters (p. 731).

CONSTITUTIONAL LAW — RIGHT OF AGENTS OF THE GOVERNMENT TO PLEAD STATUTE OF LIMITATIONS — DOCTRINE OF UNITED STATES V. LEE. — Plaintiff brought ejectment against officers of the United States army for land occupied by them as a military post of the United States. *Held* (Field, J., dissenting), that defendants could plead the Statute of Limitations in virtue of possession by the United States for the statutory period. *Stanley* v. *Schwalby*, 13 Sup. Ct. Rep. 418.

The decision of this case follows as a practical corollary from the rule of *United States* v. *Lee*, 106 U. S. 196; but it involves serious technical difficulties. It was there held, with four justices dissenting, that although the United States could not be directly sued without its own consent, yet an action of ejectment would lie against its agents for land of which they had the mere custody. The agents, both there and in the case at bar, had not such possession as on ordinary principles would have rendered them liable to ejectment; they had no estate in the land whatever, and could have pleaded that they were not tenants to the freehold if their principal had been a private person. The object of the decision in *United States* v. *Lee* was to minimize the injustice of the admitted rule exempting the sovereign from suit. It was not meant, however, to put the United States in a worse position than an ordinary principal; so that the present decision was a necessity. But it is very difficult to explain how a defendant, who claims no title whatever in himself, could support the plea of the Statute of Limitations, as is here permitted. The court admit that in effect it is the United States that sets up the statute, and accordingly also hold (a point on which there is little direct authority) that the sovereign, though not bound by the statute, may plead it. They intimate that this might even be true although no action could have been brought against the sovereign. *Sed quære;* see Wood on Limitations, § 53.

CONSTRUCTION OF STATUTE — SUNDAY LAW — SALE OF NEWSPAPERS. — *Held*, that the sale of newpapers on Sunday cannot be justified as a work of "charity" or "necessity" under the Act of April 22, 1794, nor under the provision therein enumerating, as things that may be done, the preparation of food, landing of passengers by watermen, removal of persons with their families, delivery of milk or other necessaries. *Commonwealth* v. *Matthews*, 25 Atl. Rep. 548 (Penn.).

This decision must be regarded as technically correct; but there may well be a feeling that the Pennsylvania court would not have been altogether unwarranted in declaring Sunday newspapers to be "works of necessity."

CONTRACT — OFFER OF REWARD. — The proprietors of a patent medicine offered a reward of £100 to any one who should contract the influenza after using the medicine according to directions. *Held*, that there was a valid contract between the company and a person who fulfilled all the conditions, with knowledge of the offer. *Carlill* v. *The Carbolic Smoke Ball Co.*, [1893] 1 Q. B. D. 256; 6 Harv. Law. Rev. 157. This affirms the decision of Hawkins, J., in (1892), 2 Q. B. 484.

It is a pity that the court did not deal more thoroughly with the question as to whether there was a request on the part of the company, as this is really the point on which the decision hinges.

CONTRACTS — CONTINUING OFFER — RIGHT TO REVOKE. — Plaintiff ordered of defendant all the wheels that he should need during the season. The latter accepted this, and filled certain orders at the specified prices, but refused to fill other orders. *Held*, that the acceptance of the order was merely an offer to furnish the goods, but,

after this had been acted upon by plaintiff, and defendant had had the benefit of a sale, the entire contract was binding. *Cooper et al.* v. *Lansing Wheel Co.*, 54 N. W. Rep. 39 (Mich.).

It is submitted that this decision goes too far. There is a continuing offer and, when an order is sent in, the offer is accepted *pro tanto;* so defendant should have been compelled to furnish the goods ordered before notice of revocation. The right to revoke should not be taken away, as the offer has never been accepted *in toto*. *Railway* v. *Withans*, L. R. 9 C. P. 16, is cited as upholding the court's view; but it only decides that by an order the offer is accepted to the extent of the order.

CONTRACTS — CORPORATIONS. — *Held*, that when extra work is done by a building contractor for a corporation, with knowledge of a majority of the directors, and upon the assurance of one of them that the company will pay for it, and upon the after assurance that there had been a meeting at which the company had agreed to pay, this is sufficient, regardless of whether the director had any authority to make such assurance, or even whether he told the truth about the meeting, to raise an obligation on the part of the company to pay for such work as it receives the benefit of. *Tryon* v. *White & Corbin Co.*, 25 Atl. Rep. 713 (Conn.).

The action here was for work and materials, and there can be no doubt that on the principles of quasi-contract the decision is correct. The plaintiff acted in good faith, and not as a volunteer or officious stranger.

CONTRACTS — PUBLIC POLICY — PROCURING TESTIMONY. — A debtor sold all his property, and left the country. Defendants, who were creditors, offered plaintiff one quarter of all they recovered, if he would procure affidavits and testimony from the debtor and two other witnesses that no consideration was paid for the property, and that the purchaser knew of debtor's insolvency. *Held*, such an agreement is illegal, as it tends to subornation of perjury, and is against public policy. *Goodrich* v. *Tenney*, 33 N. E. Rep. 44 (Ill.).

For similar decisions declaring contracts to procure testimony void, as against public policy, see 67 Ill. 256; 48 Cal. 369.

CRIMINAL LAW — CONSPIRACY — RESTRAINT OF TRADE. — Retail coal-dealers formed an association to fix prices of coal in Lockport. According to their by-laws, a vote of the members determined prices. Those actually adopted were reasonable. One dealer in Lockport would not join the association, whereupon the organization gave notice to the wholesale dealers, who then refused to sell him coal. *Held*, the members of the association were guilty of a conspiracy to do acts injurious to trade. *People* v. *Sheldon*, 21 N. Y. Sup. 857.

By an early New York statute a conspiracy "to commit any act injurious . . . to trade or commerce" is a misdemeanor. The court speak as though the attempt to fix prices were the offence. By such a construction of the statute, mere contracts in restraint of trade, instead of being simply unenforceable, would furnish grounds for an indictment, and a most radical doctrine would take the place of the common-law rule. *Mogul S. S. Co.* v. *McGregor*, (1891) App. Cas. 45–47. But if the statute be merely declaratory of the common law, the combination to fix prices at which members would sell coal would not be illegal, but the attempt to prevent the wholesale dealers from selling to any except members would constitute a conspiracy. Erle on Trades Unions, pp. 35–42; Bishop, Crim. L., § 233. In *Com.* v. *Hunt*, 4 Met. 111, Chief-Justice Shaw in an able opinion seems to reach an opposite result. It is submitted, however, that Chief-Justice Savage, in *People* v. *Fisher*, 24 Wend. 9, which the principal case follows, states the sound doctrine: "If the defendants cannot make coarse boots for less than one dollar per pair, let them refuse to do so; but let them not, directly or indirectly, undertake to say that others shall not do the work for less."

CRIMINAL LAW — INTERSTATE EXTRADITION — POWER TO TRY FOR DIFFERENT CRIME. — Persons brought into one State from another by extradition proceedings, to answer a charge of one crime, may be tried on an indictment for a different crime. *Commonwealth* v. *Wright*, 33 N. E. Rep. 82 (Mass.).

This same point has been recently decided in the same way by the Georgia court, in *Lascelles* v. *State*, 16 So. E. Rep. 945. Both the Massachusetts court and the Georgia court cite *People* v. *Cross*, 32 N. E. Rep. 246 (N. Y.), and treat the question as the New York court treated it. See 6 Harv. Law Rev. 320.

CRIMINAL LAW — POWER OF THE JURY. — The jury are not the judges of the law applicable to a criminal case, but must accept that laid down by the court. *State* v. *Burfee*, 25 Atl. Rep. 964 (Vt.).

The court had to overrule an earlier case. *State* v. *Croteau*, 23 Vt. 14, to adopt this commonly accepted doctrine. 3 Greenleaf, Ev. § 179.

EQUITY — COVENANT BY LESSOR — SPECIFIC PERFORMANCE — INJUNCTION. — The defendant lessors covenanted with the plaintiff lessee of a flat to provide a porter resident in the building, to be constantly in attendance in person or by some trustworthy assistant. The lessors appointed a cook to reside on the premises, and permitted him to carry on his business as cook at another place, and delegate his duties as porter to boys and charwomen. The plaintiff prayed for (1) an injunction to restrain defendant from employing as a porter any person who was not resident and constantly in attendance, and able and willing to act as the servant of the plaintiff according to the agreement; (2) specific performance of the agreement to appoint a resident porter according to the terms of the covenant; (3) damages. *Held*, by the Court of Appeal (reversing the decision of A. L. Smith, J., who granted an injunction and a decree of specific performance in the terms of the plaintiff's prayer), that specific performance could not be decreed because the execution of such a contract would require a constant superintendence by the court; and that what the court could not do affirmatively and directly by a decree it could not do negatively and indirectly by injunction. Held further by Kay, L. J., that damages were an adequate remedy. *Ryan* v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116 (Eng.).

A report of this case as it was decided by A. L. Smith, J., and a criticism of the decision in accordance with the conclusion here arrived at, will be found among the Recent Cases in 6 Harv. Law Rev. p. 157.

INSURANCE — CONDITIONS OF FORFEITURE. — By the terms of a fire insurance policy taken out by a mortgagor, it was to become void "immediately upon the passing or entry of a decree of foreclosure or upon a sale under a deed of trust." The mortgage gave a power of sale to B as attorney for the mortgagees, and he sold the property before the fire. The proceeding was, however, in law only an unaccepted proposition for a purchase, and no title passed to the vendees till it was confirmed by the court after the fire. *Held*, the policy was not forfeited. The conditions were meant to provide that the insurance should cease to be effective only when the title of the insured came to an end. *Hanover Ins. Co.* v. *Brown*, 25 M. E. Rep. 989 (Md.).

INSURANCE — SURRENDER OF POLICY UNDER MISTAKE OF FACT. — A held an insurance policy for $6,000 on B's life. To avoid paying the large premiums, he surrendered the policy, and in return got a paid-up one for $2,500. At the time, B was really dead, though A and the company supposed him alive. *Held*, as both parties acted under a mistake of fact, equity will reinstate the $6,000 policy upon surrender of the paid-up one. *Riegel* v. *Am. Life Ins. Co.*, 25 Atl. Rep. 1070 (Pa.).

The court say, "In many of the cases, prominence is given to failure of consideration resulting from mutual mistake or ignorance of material facts; but entire failure of consideration is not an essential ingredient in any case." This is certainly true. In the case of money paid where the consideration has failed, money paid under a mistake of fact, and in a case like the present, the defendant has something which in justice belongs to the plaintiff. Sometimes the plaintiff may be made good by an action at law for money had and received, and sometimes, as in the principal case, an obligation will have to be reinstated in a court of chancery. But always the remedy is purely equitable in spirit, and the object is restitution.

JURISDICTION — ILLEGAL SENTENCE — HABEAS CORPUS. — A defendant in a criminal case was convicted of a crime, the maximum punishment for which was two years' imprisonment. The judge by mistake sentenced defendant to five years' imprisonment. *Held*, that the judgment was not merely erroneous, but void, and a writ of *habeas corpus* should be granted. *Ex parte Cox*, 32 Pac. Rep. 197 (Idaho).

The court say that jurisdiction includes, not only power over the person and subject-matter, but also authority to render the particular judgment given; and so here, as the sentence was unauthorized, and the judgment was entire and indivisible, the jurisdiction completely failed. This appears to be the more modern, though not universal, doctrine. See Black, Judgments, § 258.

MORTGAGE — COMPENSATION OF MORTGAGEE FOR SERVICES PERFORMED AS SOLICITOR IN FORECLOSURE SUIT AND SALE. — *Held*, in analogy to the cases of solicitor-trustees, that a mortgagee who is also a solicitor cannot claim compensation for legal services performed by him in the foreclosure of the mortgage, but only for his actual costs out of pocket. *Held*, however, that if the services are preformed by a firm of which the mortgagee is partner, the other partner, who is not a mortgagee, is entitled to a fractional part of the sum found to be the value of the services, in the ratio in which he shares in the firm profits. *In re Donaldson*, 27 Ch. D. 544; and *Cradock* v. *Piper*, 1 Mac. & G. 664, disapproved. *In re Doody*; *Fisher* v. *Doody*; *Hibbert* v. *Lloyd*, [1893] 1 Ch. 129 (Eng.).

PUBLIC OFFICER — PAYMENT OF SALARY TO DE FACTO OFFICER — DISCHARGE OF OBLIGATION TO OFFICER DE JURE. — A and B were opposing candidates for county treasurer. The return of the board of canvassers was in favor of A. B contested the election, and, the county court deciding in his favor, entered into and discharged the duties of the office. A appealed to the district court; and after nearly twenty-two months the decision of the county court was reversed, and A took possession of the office. At the end of A's term he refused to pay over to his successor a sum of money which he claimed was due him as salary while the office was held by B, and which the county had paid to B while he was in possession of the office. Upon an application for a writ of mandamus to compel A to pay over the money, *held* that the county discharged its liability by paying the salary to B, the *de facto* officer, and A had no claim upon the county for the money. *State ex rel. Greeley County* v. *Milne*, 54 N. W. Rep. 521.

The case is in accordance with the weight of authority, although it may well be questioned if it is right in principle. See, *contra*, *Andrews* v. *Portland*, 74 Me. 484; s. c. 10 Am. St. Rep. 280, at 284, where the cases are collected and discussed in a note. Cases are also collected in 19 Am. & Eng. Ency. of Law, 532.

REAL PROPERTY — ADDITIONAL BURDEN — RIGHTS OF ABUTTING OWNERS. — *Held*, that building and operating a steam railroad in the streets of the city of St. Louis under authority from the city, was not such a perversion of the highway from its original purposes as to render the railway company liable in damages to the abutting owners for the additional burden imposed. *Henry Ganes & Sons Manuf. Co.* v. *Ry.*, 20 S. W. Rep. 658 (Mo.).

This agrees with earlier cases in Missouri, but the weight of authority is *contra*. Lewis, Eminent Domain, § 115, and note.

REAL PROPERTY — DEDICATION — ACCEPTANCE. — Where a strip of land had been platted and laid out as a highway, *held*, that four years' use by the public was sufficient to constitute an acceptance, and make the dedication complete. *Los Angeles Cemetery Ass'n* v. *City of Los Angeles*, 32 Pac. Rep. 240 (Cal.).

There is very little authority in this country as to whether use for a time less than the period of prescription will constitute an acceptance. The weight of authority seems to be with this case.

REAL PROPERTY — STATUTE OF FRAUDS — INTEREST IN LAND. — A sale of growing trees to be felled and removed by the vendee is a contract concerning land within the provisions of the Statute of Frauds. *Hieth* v. *Graham*, 33 N. E. Rep. 90 (Ohio).

The case is one of first impression in Ohio; the authorities are somewhat in conflict, and the subject has been confused by the case of *Marshall* v. *Green*, 1 C. P. D. 35, which the learned judge criticises. The decision seems sound.

REAL PROPERTY — TRESPASS ON A HIGHWAY — RIGHTS OF THE OWNER OF THE FEE. — The defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon this moor, the plaintiff went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. The defendant's keepers having forcibly prevented the plaintiff from such interference, he brought an action for assault against the defendant, in which the defendant justified on the ground that the plaintiff was a trespasser upon his land on the occasion in question, and by way of counter-claim asked for damages and a declaration of his rights. *Held*, that, inasmuch as the plaintiff was upon the highway for purposes other than its use as a highway, he was a trespasser, and that verdict should be entered for the defendant on his justification, and for nominal damages on his counter-claim. *Held* further, Lord Esher, M. R., *dissenting*, that the court ought to make a declaration of the defendant's rights to the above effect. *Harrison* v. *Duke of Rutland et al.*, [1893] 1 Q. B. 142 (Eng.).

This decision was in the Court of Appeal, and was in reversal of the judgment of the Lord Chief Justice. The result seems as correct as it is picturesque. *Cole* v. *Drew et uxor*, 44 Vt. 49; *Wellman* v. *Dickey*, 78 Me. 29.

STATUTE OF FRAUDS — SUFFICIENCY OF A RECITAL IN A WILL AS A MEMORANDUM. — A, being a member of a partnership firm consisting of A, B, and C, verbally agreed with B and C to guarantee them against loss in respect of an existing debt due the partnership from his son. A died, having by his will given a share of his estate to his son's wife and children; and, after referring to his son's indebtedness to the firm, and stating that he had guaranteed the firm against loss in respect of the debt, he directed that the amount of the debt should be brought into hotchpot in ascertaining

the share given by his will. By a codicil he "confirmed the guarantee mentioned in his will." *Held*, that although the mention of the guarantee in the will should be construed as made only for the purpose of explaining the directions which the testator was about to give, any writing embodying the terms of the agreement, and signed by the person to be charged, was sufficient" to satisfy the Statute of Frauds, since the object of the statute was merely to require written evidence signed by the party to be charged. *In re Hoyle; Hoyle* v. *Hoyle*, [1893] 1 Ch. 84 (Eng.).

This case is clearly in accord with the trend of authorities. Browne on the Statute of Frauds, §§ 346 and 354a.

TORTS — NEGLIGENCE — PROXIMATE CAUSE. —Through defendant's negligence in permitting an opening in a bridge to remain open, a child fell into a canal, and the father in an effort to rescue it was drowned, together with the child. *Held*, that the death of both must be attributed to the negligence of defendants. *Gibney* v. *State*, 33 N. E. Rep. 142 (N. Y.).

The contention here was that the causal connection between defendant's negligence and the death of the father was broken by his own act. It seems perfectly clear, however, that such an act is as purely instinctive as one of self-preservation; consequently, there is no conscious act intervening to break the chain of causes. *The Balloon Case* (*Guille* v. *Swan*), 19 Johns. 381, and *Thomas* v. *Winchester*, 6 N. Y. 397, are cited as supporting the conclusion of the court; but in both of those cases the intervening agents were acting consciously.

TRUSTS — FOLLOWING TRUST FUNDS. — An administratrix applied a portion of the funds of the intestate estate in part payment of the price of land, which had previously been conveyed to her on her own credit and for her own benefit. *Held*, that there was not a resulting trust of the land in favor of the estate, since the funds of the estate formed no part of the original consideration for the conveyance, and such a trust can result, if at all, only at the time the title vests. *Bowen* v. *Hughes*, 32 Pac. Rep. 98 (Wash.).

The decision is certainly correct, but the reasoning, it is submitted, is not satisfactory. The doctrine of resulting trust would seem to have no application, since it is a case, not of payment of the purchase-money by a third party, but of a misappropriation of funds by the purchaser. The case is, therefore, one of following trust property. The true *ratio decidendi* would seem to be that, as the title to the land had already vested in the administratrix, the real product of the missappropriated trust-funds was, not the land, but the claim of the vendor against the administratrix for the purchase-money; and the plaintiff, instead of seeking to obtain the land, should have proceeded against the administratrix on the aforesaid claim, which equity would keep alive for his benefit.

TRUSTS — VOLUNTARY RELEASE — CONSIDERATION. — A, by writing, consented to the remission of 50,000 francs from the indebtedness of his daughter B to him. He also informed A that he had transferred to her account on his books the sum of $14,000 (for which he was indebted to his deceased wife), in accordance with his deceased wife's last wishes. B was to hold this as trustee for her sister C. *Held*, that the transfer to B was supported by a valuable consideration, *i. e.*, the indebtedness to the wife, and that the trust in favor of C was validly created; that the release of the daughter's indebtedness was invalid, not being supported by any consideration. *Landon* v. *Hutton*, 25 Atl. Rep. 953 (N. J.).

The decision of the court would seem to be correct. According to the wishes of the wife, A was equitably bound to pay the amount of his indebtedness to C. When he made B trustee for C, he made himself B's debtor, and B trustee of the debt for the benefit of C. The court, without any particular justification, set forth the doctrine that a meritorious consideration did not exist to support the trust. This was scarcely necessary when they had already declared it valid on another ground.

WILLS — CONSTRUCTION — CONFLICTING DEVISES. — Testator devised a tract of land to A in fee, and by a later clause of the same will devised the same tract to B in fee. *Held*, that as it was evident from the facts of the case that the conflict was due to a mistake in description rather than to any intention on the part of the testator that the second clause should supersede the first, A and B should take the land as tenants in common. *Day et al.* v. *Wallace*, 33 N. E. Rep. 185 (Ill.).

This is a case of first impression in Illinois; and the court, recognizing that the authorities are divided, has adopted Lord Brougham's suggestion in *Sherrat* v. *Bentley*, 2 M. & K. 149, at p. 165, which is approved in 1 Redf. Wills, 443, and 1 Jarm. Wills, 476. It is held in some jurisdictions that such devises as these are hopelessly repugnant, and that the second devise must therefore revoke the first. See *Hollins* v. *Coonan*, 9 Gill. 62; *Covert* v. *Sebern*, 35 N. W. Rep. 636 (Ia.).